

Regulatory Hotline

April 16, 2018

VIEWS: CAN LAW AND POLICY PROMOTE A CULTURE OF INNOVATION?

This article was originally published in the 13th April 2018 edition of

THE TIMES OF INDIA

While India has its share of unicorns, most have adapted global business models. We are yet to see Indian companies revolutionizing the global market. **Steve Wozniak**, co-founder of Apple, recently attributed this lack of “creativity” to our education system, an often ignored but important aspect are sound governmental policies that promote innovation and laws which don’t impede it.

It’s now a cliché that law lags behind technological innovations. Therefore, the question then arises, is there a need for governmental intervention? If yes, why and to what extent? Often, the tendency to introduce regulation is due to the fear of the unknown or as a reaction to the actions of one rogue industry player.

Therefore, the onus is on the industry players to act responsibly.

Innovative businesses need to voluntarily self-regulate to ensure that the interests of all the stakeholders including the government are respected. The government must act as an enabler and work in collaboration with the industry to identify and plug gaps in the present policy.

We saw a spate of new drafts being released recently by way of a Digital Information Security in Health Care Act., **Committee** report on Artificial Intelligence, Committee to regulate online content, Space Activities Bill, Drone Policy, consultations to regulate the Cloud, M2M, among others. While the consultative process of is commendable, the need and timing of each of these drafts is yet to be determined. In this context we must evaluate the steps taken by law makers and suggest a possible approach for regulatory intervention which can be adopted when a new technology gains critical mass to ensure that laws do not act as an impediment to innovation.

- **How should law and policy be adopted in the context of the Indian situation**—Net neutrality principles as are adopted in developed countries may not necessarily fit in well in the Indian context in an as –is manner without taking into account the development of the infrastructure, the role of telecom operators, development of OTT services, and others.
- **Examine what is the likely mischief and whether the current law is sufficient to address that.** An example, with the increasing importance of data, data theft, is a possible mischief. Therefore, it is to be evaluated whether the existing provisions of “theft” under the Indian Penal Code adequately address that mischief? Law of tort is often an ignored body of law in India. Several principles such as vicarious liability, negligence, trespass and nuisance can be applied in several instances. E.g, in cases of accidents by driverless cars, the contributory negligence principles under tort may very well apply.
- **Focus on implementation of present laws.** Given that the government is actively repealing irrelevant laws, before enacting new laws, the focus needs to be addressing issues arising with the implementation of the existing laws. One of the reasons identified for the introduction of a new data protection framework was the fact that the implementation of the existing data protection laws had failed.
- **Examining the extent of regulation in line with purpose.** When digital payments increased, the risk of misuse of customer funds spawned and therefore a technological solution in the form of two-factor authentication was introduced. However, the establishment of two-factor authentication, the additional imposition of monetary limit to the transactions, may not necessarily be required.
- **Intervene only where there is a specific and recognized need to intervene.** There must be a demonstrated failure of the industry to act responsibly which warrants governmental intervention. E.g. the RBI in a surprise move recently introduced a data localization requirement for all payment systems. This requirement has taken the entire industry by surprise since it was introduced without any public consultation and there does not appear to be any specific incident or market failure to have precipitated this requirement
- **What sanctions should be imposed?** Whether the law should impose only civil liability or criminal as well, if there is a point of contention. India is on the cusp of introducing data protection law. One aspect that has been debated is whether the imposition of penal sanctions is required. There has been ideation by a Committee of Experts to allow criminal penalty for violations concerning data protection. However, criminal sanctions will only deter innovation and make businesses risk averse. Professors **Elizabeth Pollman** & Jordan M. Barry in their paper on Regulatory

Research Papers

New Age of Franchising

June 20, 2025

Life Sciences 2025

June 11, 2025

The Tour d’Horizon of Data Law Implications of Digital Twins

May 29, 2025

Research Articles

2025 Watchlist: Life Sciences Sector India

April 04, 2025

Re-Evaluating Press Note 3 Of 2020: Should India’s Land Borders Still Define Foreign Investment Boundaries?

February 04, 2025

INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals

January 15, 2025

Audio

CCI’s Deal Value Test

February 22, 2025

Securities Market Regulator’s Continued Quest Against “Unfiltered” Financial Advice

December 18, 2024

Digital Lending - Part 1 - What’s New with NBFC P2Ps

November 19, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

Yyapak Desai speaking on the danger of deepfakes | Legally Speaking with Tarun Nangia | NewsX

April 01, 2025

Entrepreneurship recognize that “if a law provides for the incarceration of the executives of a company that violate it, that may deter the guerrilla growth strategies that some modern regulatory entrepreneurs employ”.

- **Building capacity.** It appears that whenever the government is not comfortable in understanding how a technology works, its first response is to try and ban a technological advancement as was the case with drones in India in 2014. Later the government progressed in its outlook by recognizing the possible benefits / uses of drones and introducing a draft policy in that regard. With several such examples, the RBI's recent directions against virtual currencies seems inexplicable. The mere fact that a technology or business model is possible of being misused cannot be grounds for banning an entire industry, this goes against the ethos of an innovation based economy. Therefore, it is imperative that the regulators, industry participants and technical experts all work together to assuage any concerns before a formal policy is unveiled.
- **Are we giving enough clarity to businesses?** Two points here. First, more often than not, regulators and law makers make statements indicating an intention to regulate new technology or business models which create uncertainty in the market without any legislative or policy being enacted as was the case with bitcoins and is now playing out with the MIB's plans to regulate online content and news. Second, since technologies are evolving and are often abstruse, capturing them in words is difficult. Therefore, the drafting of the laws and regulations should be carried out by taking assistance of experts in the field.
- **Lack of concerted / consolidated efforts to address the overlapping issues.** Given that various regulators may get involved in regulating startups, the Government needs to demarcate the jurisdiction of each regulator due to a clear lack of inter-departmental liaising. For the industry, clarity in terms of the regulatory body who they should engage with is crucial. For example, in the past the **TRAI** and MeitY and now RBI and the Ministry of Health are all looking to regulate data in India, creating confusion in the market.

Therefore, the need of the hour is for the government to rethink its strategy while dealing with emerging technological advancements and new business models. A concerted intra – departmental effort to apply restraint in regulating the unknown and even going as far as allowing businesses to operate in the ‘grey’ is what we need to give rise to our homegrown startups that can rival the likes of Airbnb, Tesla, Uber, and others which are said to have grown at a scorching pace because they operated in a regulatory grey area! This approach will also force incumbent startups to adopt higher standards of corporate governance that take into account interest of all stakeholder to give confidence to the government to act as an enabler rather than a disruptor.

– **Kartik Maheshwari & Gowree Gokhale**

You can direct your queries or comments to the authors

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.